Supreme Court, U.S.
FILED
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OFFICE OF THE CLERK

No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

AIKO OGATA, JACK OGATA,

Petitioners,

v.

J. G. CONSTRUCTION CO., INC.,
JAMES S. GREDING,

Respondents.

On Petition For Writ Of Certiorari
To The Court Of Appeal,
Second Appellate District,
State Of California

PETITION FOR WRIT OF CERTIORARI

AIKO OGATA
JACK OGATA
910 E. Irving Drive
Burbank, CA 91504

(818) 842-9802

23pp

QUESTION PRESENTED FOR REVIEW

Is it a denial of due process under the fifth and fourteen amendments for plaintiffs to be deprived by the Court of Appeal of the State of California of property awarded to them by a final judgment of a California court and by a final order of the Contractors State License Board for the State of California?

PARTIES

All parties are identified in the caption.

CITATION

The opinion of the Appellate Court, Case No. 125245, was unpublished (Appendix A).

JURISDICTION

The opinion of the Court of Appeals was entered on March 24, 2000, and the Supreme Court denied the petition for review on June 14, 2000. The jurisdiction of this Court is invoked under 28 U.S.C. 1257(a).

Petitioners, AIKO OGATA and JACK OGATA, petition for a Writ of Certiorari to review the judgment of the State of California, Second Appellate District, Division Seven in this case.

STATEMENT OF THE CASE

Plaintiffs entered into a home improvement contract with defendants on September 9, 1991 for a total contract price of $63,195 and a subsequent replumbing contract for a total contract price of $2,000 on February 1, 1993.

On December 29, 1993 plaintiffs filed with the Burbank, California Small Claims court a claim for breach of contract and received a judgment in the sum of $823 for the correction of the cement slab.

On May 16, 1994 plaintiffs filed a complaint with the Contractors State License Board of the State of California claiming poor workmanship and received an order for payment in the sum of $4,000 for the violation of the Business and Professions Code 7115(a) [7159] because of the failure to comply with the home improvement contract form law subsection (d): Payment schedule specified a down payment in excess of $1,000 or 10 percent of the contract price, whichever is the lesser and a civil penalty of $500.

A complaint for damages was filed in the Superior Court in the State of California on June 11, 1996 against

the defendants. At the conclusion of the trial the court ruled that plaintiffs were not entitled to damages because they had already received from the Contractors Board and the Small Claims court more than the amount the Court was ready to award plaintiffs. Judgment was entered June 25, 1998 against plaintiffs in the sum of $26,775.71 for attorney fees and costs.

REASONS FOR GRANTING THE WRIT

This case presents due process question of exceptional importance warranting review by this Court because of the inability of the civil court system to accept the jurisdiction of the state agency and the deprivation of property four years (March 24, 1994) after a judgment entered of a court of competent jurisdiction.

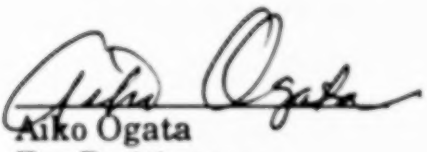
Because of the action of the Court of Appeal petitioners were deprived of their property of $4,000, a violation of due process. Hovey v. Elliott, 167 U.S. 409 (1897); Sniadach v. Family Finance Corporation, 395 U.S. 337, 89 Supreme Court 1820, and 23 L.Ed.2d 349 (1969).

Furthermore, it was a violation of due process to grant respondents a hearing in the Superior Court on the same subject matter on which he had waived a hearing on the order to modify the citation before the Contractors State License Board citation, a violation of res adjudicata affect to the determination of the Contractors License Board. Trujillo v. Santa Clara County, 775 F.2d 1359 (9th Cir. 1985)

CONCLUSION

For all of the above reasons, Petitioners would request this Honorable Court to grant certiorari and reverse the opinion of the Court of Appeal of the State of California, Second Appellate District, Division Seven.

Respectfully submitted,

By: 

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For Petitioners
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APPENDIX A

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA, SECOND APPELLATE DISTRICT DIVISION SEVEN

ENTERED ON MARCH 24, 2000

AIKO OGATA, et al., Plaintiffs and Appellants, v. J. G. CONSTRUCTION CO., INC., et al., Defendants and Respondents.	B125245 (Los Angeles County Superior Court No. BC151700)

APPEAL from a judgment of the Superior Court from a judgment of the Superior Court for the County of Los Angeles. Emilie H. Elias, Commissioner. Affirmed.

Aiko Ogata and Jack Ogata, in pro per; Arthur E. Cooper, for Plaintiffs and Appellants.

Paul R. Geissler; Anderson, Krehbiel, McCreary & Bryan, Joel R. Bryan and Ann C. Fitzmaurice for Defendants and Respondents J. G. Construction Co., Inc. James S. Greding and Surety of the Pacific.

Respondent Star Insurance Company does not appear.

SUMMARY

The trail court properly rejected certain claims of construction defects, and properly credited the construction contractor with damages earlier paid to the claimants in the small claims action and a Contractor's State License Board proceeding.

FACTS AND TRIAL COURT PROCEEDINGS

In 1996 appellants Aiko and Jack Ogata sued respondents J. G. Construction Co., Inc. and its principal James S. Greding for breach of an agreement entered into in 1991 for repairs and construction of the Ogatas' home. Appellants also alleged fraud and violation of a statute (Bus. & Prof. Code, section 7109) barring contractors from willfully departing from accepted trade standards or plans and specifications. The only specific allegation of fraud was that respondents "falsely represented that plaintiffs owed $8,700 on a written construction contract, and in bad faith denied the existence of the contract." The complaint did not allege facts to show that Greding was an alter ego of J. G. Construction.

Attached to and incorporated in the first amended complaint was a citation by the License Board issued to J. G. Construction detailing violations of the Business & Professions Code. The violations were allegedly committed by J. G. Construction while performing the work for

appellants. The specific defective work noted in the citation is listed in the table below.

Appellants also eventually filed a supplemental complaint alleging that Mrs. Ogata injured her leg in November 1996 after tripping on a step which appellants claimed was defectively constructed.

Respondents moved for summary adjudication of certain issues, supporting the motion with a declaration from Mr. Greding. Greding attested that he was not personally a party to the construction contract, an averment confirmed by the copy of the contract attached with his declaration. He declared that J. G. Construction was a validly existing corporation, and that the corporation performed the work for appellants, hired the employees and subcontractors who did the work, sent the invoices for it, and received the payments. All work which Greding undertook for the project was done on behalf of the corporation. Greding denied falsely claiming sums due from Ogata, and attested that the only sums claimed were those agreed to under the contract and change orders.

Appellants provided no evidence in opposition to the summary adjudication motion.

The trial court granted summary adjudication in favor of Mr. Greding on all claims, and in favor of J. G. Construction on the fraud claim.

Appellants' remaining claims then were tried to the court over the course of four days.

The evidence regarding Mrs. Ogata's personal injury claim showed that she had back surgery on November 26, 1996, two days before her alleged accident, and was returning home from the hospital at the time of the accident. She could "barely walk" because of her back surgery. Her husband was assisting her up the steps when she fell. Mrs. Ogata failed at trail to explain what defect in the steps caused her to fall, and she was impeached with deposition testimony: Question. "Do you believe that the fall was a result of the way the steps were constructed?" Answer, "My husband and also some of the things that experts say is the way the steps are, there's some-thing wrong with them. I'm not sure at this point what it is, and so I wanted my expert to look at it." Mrs. Ogata's treating physician gave evidence that she had serious history of neck, back and arm pathology before the fall. He disclaimed any knowledge of what caused her to fall.

The trial court deemed that appellants' case in chief was completed when their counsel advised he wished to call only one more witness, and that the witness was on vacation and presently unavailable. The court noted that the witness was not under subpoena, and that appellants had neither advised the court in advance of the witness's unavailability, nor sought a continuance of trial.

The court granted non-suit on the personal injury claim at the close of appellants' case in chief, finding that appellants had failed to prove by a preponderance of

evidence that Mrs. Ogata's fall was caused by acts or omissions of respondents.

The court, however, required respondents to put on a defense to the construction defects claims, deciding those claims only after hearing all the evidence. The evidence addressing these issues included the following.

Appellants presented information concerning earlier proceedings in which the appellants sought redress for J. G. Construction's alleged wrongs.

In March 1994 appellants obtained an $816 small claims judgment against respondents for breach of the contract. The small claims complaint is not included in the record on appeal, and the judgment does not disclose what breach or defect was the basis for the award.

In 1996 appellants complained to the License Board, resulting in the citation noted above. The citation had been settled without a hearing or adjudication, by a stipulation between respondents and the Attorney General (representing the License Board). Appellants were not parties to the stipulation. The stipulation provided for "deletion" of items 1, 2, and 3 of the citation, and modified item 4 to specify that respondents would pay $4,000 "restitution" to appellants. The stipulation did not specify which alleged defective work, specific costs of repair, or damages were intended to be covered by the $4,000 restitution sum. It did not purport to bar a subsequent action by appellants for damages.

Before the present suit was filed, respondents paid appellants $4,816 to satisfy in full the small claims judgment and the restitution provided for in the stipulation settling the License Board citation.

Appellants' trial brief listed the defects claimed and the amount of damages sought for each. The list in the brief included all defects claimed in the small claims suit, all defects alleged in the License Board citation, and a host of additional defects. Appellant Aiko Ogata affirmed in her testimony that appellants sought recovery for all defects and damages claimed in the brief. Further, appellants' expert, John Rhine, gave testimony concerning damages caused by the defects claimed both in the small claims case and the License Board citation: for example, the front and rear steps, the front and rear doors and their hardware, and the under-sized shower.

Three additional construction experts were called, two by respondents (Krinitt and Haslam), and one by appellants in rebuttal (Bowen, who had inspected the property for the License Board). They addressed the claimed defects in detail.

The trial judge concluded that some of the claimed defects were proven, and fixed the amount of damages associated with these. She rejected other claims. She explained her conclusions at length on the oral transcript, and then later in a detailed written statement of decision citing the relevant exhibits. The claimed defects and

damages, and amounts awarded by the trial court, are summarized in the following table.

Defect/Damages	Claimed In Small Claims Action	Noted in License Board Citation	Claimed in Civil Case	Trial Court Award
Front Door $200	X		X	
French panels $750	X		X	
Hanging hardware, front and rear doors $140	X		X	
Finish entry, dining ceiling, $300	X		X	$350
Drywall $3,895	X		X	
Front door hardware $200	X	X		
Water damage to front and rear doors	X	X	X	
Front side panel $200	X		X	
Front cement entry slab $823	X		X	
Exterior door jambs $127	X		X	
Rain gutter		X	X	$200
Bathroom shower wrong size out of specification $3,300		X	X	$1,500
Front and rear steps out of specification $4,500		X	X	$1,200

Defect/Damages	Claimed In Small Claims Action	Noted in License Board Citation	Claimed in Civil Case	Trial Court Award
Drywall, fire and garage, out of specification		X	X	
Fail to complete project for agreed price		X		
Extended garage entry $475			X	
Drainage master bathroom $600			X	
Floor levels differ, master bed to bath $4,000			X	
Blocked inspection panel $200			X	
Kitchen pass-through $180			X	
Mismatch plaster and sheath rock $1,300			X	
Attachment drywall to french door $180			X	
Water heater plum not to code $450			X	
Roof leaks $400			X	
Garage door springs, keypad switch $170			X	
Vents in room addition $160			X	

Defect/Damages	Claimed In Small Claims Action	Noted in License Board Citation	Claimed in Civil Case	Trial Court Award
Stucco crack, room addition $60			X	
Front door bell reinstall, no estimate			X	
New bedroom window $1,500			X	
Replum hot, cold water lines			X	$750
Yard cleanup			X	
Access under addition			X	$700

The damages found by the trial court totaled $4,700. The court found that J. G. Construction was entitled to a credit for the $4,816 appellants previously recovered in the small claims action and citation settlement, hence appellants were entitled to recover nothing further in superior court, and respondents were entitled to judgment.

In post-judgment proceedings the court awarded respondents $24,000 in attorneys fees and $2,000 in costs.

Appellants subsequently moved for a new trial based on what they claimed was new evidence. The new evidence consisted of the results of certain testing done after trial by expert Bowen. The trial court denied the motion.

This appeal followed.

DISCUSSION

Appellants contend the trial court erred in granting sum-mary adjudication in favor of respondent Greding on all claims, and in favor of J. G. Construction on the fraud claim.

The contract was prepared on the letterhead of J. G. Construction Company, Inc., and Greding's signature on it appears only under the name J. G. Construction Company Inc., on a signature blank after the word "by." Greding's declaration confirmed that J. G. Construction, not Greding personally, contracted with appellants and performed the contract. Appellants offered no evidence to controvert these averments or show that Greding was the alter ego of the corporation.

Greding's declaration also refuted appellants' extremely sketchy fraud allegations, and appellants provided no evidence at all to support them.

Summary adjudication was proper.

Appellants contend the trial court erred in granting non-suit on the personal injury claim. However, as the trial court found, appellants' evidence was insufficient to establish that any alleged defect in the steps caused Mrs. Ogata to fall. While there was evidence that the height or width of the steps did not conform to the building code, no evidence was offered that this disparity caused Mrs. Ogata to fall. There was no error in granting non-suit on the personal injury claim.

Appellants challenge the sufficiency of the evidence to support the trial court's findings with respect to construction defects and shortcomings.

The trial court presided over a four-day bench trial concerning appellants' highly fact-intensive allegations, and heard testimony from four different construction experts. Testimony from one or more of these experts was sufficient to support each of the court's determinations.

Appellants attack the trial court's ruling crediting their prior recovery of $4,816 against the $4,700 of damages found by the trial court. They argue that the trial court's damage findings arose, at least in part, from defects different from those asserted in the small claims action and in the License Board's citation. As the table above shows, the trial court did in fact award $1,450 for two items (replumbing work, access to the crawlspace under the new addition) which were not raised in the small claims case nor was it mentioned in the License Board citation. However, the trial court also found that the true value of the claims asserted in the small claims case, and in the citation, were lower than the amounts appellants had previously recovered. As the table shows, the trial court awarded only $350 for the items asserted in the small claims case, and only $2,900 for the items named in the citation, a total of $3,250, yet appellants previously had recovered $4,816 on these claims.

Had appellants limited their claims in the superior court only to items for which they had not previously

sought recompense, they might justifiably argue that the earlier recoveries should not have been credited to J. G. Construction in the present case. But instead, they submitted all the claims to the superior court for new trial, requesting damages far in excess of those previously recovered. Unfortunately for them, the superior court valued the defects previously claimed in small claims court, and those listed in the citation, as worth less than appellants already had recovered. It was proper for the superior court to credit J. G. Construction with these reductions in the value of appellants' claim, reductions made only after a full-blown adversarial hearing on all the claims.

The trial court correctly concluded that appellants were not entitled to additional recovery, and that defendants accordingly should have judgment.

Nor did the court err in denying the motion for new trial. Bowen, the witness whose evidence appellants proffered as "new," was one of the inspectors involved in the License Board's investigation, and indeed testified during the trial. If appellants had been diligent, they could and should have presented during trial the additional Bowen testimony they proffered as "new" after the trial. The trial court did no err in denying the motion for new trial.

Respondents' motion to strike the Ogatas' reply brief and the Ogatas' motion for sanctions, are denied.

DISPOSITION

The judgment is affirmed. Respondents shall recover their costs on appeal.

NOT TO BEPUBLISHED IN THE OFFICIAL REPORTS

NEAL, J.

We concur:

LILLIE, P. J.

WOODS, J.

APPENDIX B

BEFORE THE
REGISTRAR OF CONTRACTORS
CONTRACTS STATE LICENSE BOARD
DEPARTMENT OF CONSUMER AFFAIRS
STATE OF CALIFORNIA

In the matter of the Citation against:	)	CENTRAL REGION
J G CONSTRUCTION CO INC 1158 GREENFIELD ST THOUSAND OAKS, CA 91360	)	CIT NO. 1953245
License No. 340896, B, C-8	)	ORDER TO MODIFY
Respondent	)	

WHEREAS, a citation was duly filed and served upon respondent, J G CONSTRUCTION CO INC and,

WHEREAS, pursuant to discretionary authority vested in the REGISTRAR by Section 7099.5 of the Business and Professions Code and,

WHEREAS, the REGISTRAR acting on information submitted to him, and in the interest of justice, and,

WHEREAS, since filing of said citation, it has been determined that good cause exists to modify the citation, therefore,

IT IS HEREBY ORDERED that the citation filed on or about, 2/16/96 being citation number 1953245, is hereby modified as follows:

The Civil Penalty assessed in Item 1, 2 and 3 ARE DELETED.

The Civil Penalty assessed in Item #4 IS AFFIRMED.

The Total Civil Penalty is $500.00

The Civil Penalty is due on January 9, 1997

The Order of Correction is to pay Mr. and Mrs. Ogata the sum of $4,000 on January 9, 1997.

Citation No. 1953245 shall become a final order of the Registrar on the 9th day of January 1997.

IT IS SO ORDERED THIS 17th day of December 1996.

/s/ Jannette A. Stewart
For GAIL W. JESSWEIN
Registrar of Contractors
Contractors State License
Board, State of California

APPENDIX C

Second Appellate District, Division Seven, No. B125245

S087961

IN THE SUPREME COURT OF CALIFORNIA
EN BANC

SUPREME COURT FILED JUNE 14, 2000
Frederick K. Ohlrich Clerk, Deputy

AIKO OGATA Et Al., Appellants

v.

J. G. CONSTRUCTION COMPANY INCORPORATED Et Al.,
Respondents

Appellants' petition for review DENIED.

GEORGE
Chief Justice